Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
IP-Enabled Services	)	WC Docket No. 04-36

REPLY COMMENTS OF

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS;
NATIONAL LEAGUE OF CITIES; NATIONAL ASSOCIATION OF COUNTIES; U.S. CONFERENCE OF MAYORS; NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS;
TEXAS COALITION OF CITIES FOR UTILITY ISSUES;
WASHINGTON ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS;
GREATER METRO TELECOMMUNICATIONS CONSORTIUM;
MT. HOOD CABLE REGULATORY COMMISSION;
METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS;
METROPOLITAN AREA COMMUNICATIONS COMMISSION
RAINIER COMMUNICATIONS COMMISSION;
CITY OF PHILADELPHIA;
CITY OF TACOMA, WASHINGTON;
AND
MONTGOMERY COUNTY, MARYLAND

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SUMMARY

The NPRM opens the door to the assertion of Commission authority over the entire field of information services, but does not offer the public the benefit of the Commission's thoughts on exactly how far that authority might extend or how the Commission intends to exercise it. Consequently, commenters have taken the opportunity to promote their own self-interested visions of the future, with little regard for the overall reasonableness or effectiveness of those visions. Commenters also have presented a wide range of views regarding the scope and origin of the Commission's authority over information services, which confirms the Local Government Coalition's skepticism regarding the Commission's ability to offer any certainty in this area.

The Coalition remains convinced that the Commission cannot act outside the scope of the Act as it stands, and in particular that Titles II and VI of the Act preclude any effort to adopt a radical new scheme based solely on Title I. Nevertheless, in response to the multiple regulatory rubrics proposed by other parties in the opening round of comments, the Coalition has developed a set of nine principles that should guide any federal action with respect to the regulation of IP-enabled services. The Commission may not have the power to implement these principles, but any attempt to establish a fair, rational, and efficient regulatory structure must include them.

The nine principles are:

1. ***The federal government should act to promote technological progress while protecting the rights and interests of all affected parties.*** In essence, the Commission should not favor any particular technology or industry sector, nor should it favor the private sector over the interests of the public, as represented by local governments and other government bodies.

2. ***Federal law should regulate the "facilities" layer.*** The Commission must be sensitive to the advantages inherent in facility ownership and the ability to cross-subsidize. Consequently, facilities owners that do not face meaningful competition must be regulated. Two or three facilities owners are insufficient to provide meaningful competition.

3. ***Service providers should pay fair prices for access to networks.*** Any person who uses the property of another should pay for the right: facilities owners are entitled to compensation from providers who use their networks to provide services.

4. ***Facilities owners should pay fair prices for their use of public property, regardless of their choice of technology.*** Government entities act as trustees for the public, and thus have an obligation to obtain fair compensation for the use of public property, whether it consists of the public rights-of-way or the public airwaves. All facilities owners should pay for the use of public property on a model similar to the cable franchise fee model.

5. ***Federal law should forbear from economic regulation of service providers in competitive markets.*** If there is meaningful competition for a service, economic regulation is not necessary. The Coalition believes such competition will develop for most and possibly all services. Nevertheless, the possibility of regulation must not be foreclosed, so that the appropriate level of government can deal with any exceptions.

6. ***All service providers should be required to contribute towards support of universal service.*** All service providers, regardless of whether they provide information services or telecommunications services, benefit from the existence,

maintenance, and extension of the network. Thus, all should pay to ensure that every American has access to the network. Otherwise, providers will migrate to new technologies that are not required to participate, and eventually undermine the goal of access for all citizens.

7. ***All providers of voice services should be required to offer E-911 functionality and disability access.*** Like universal service, these are fundamental requirements, and should be considered nonnegotiable.

8. ***The federal government should respect and preserve the police powers of state and local governments.*** Federal law must distinguish between economic regulation of service providers in competitive markets and the exercise of local police powers. Local governments play an essential role in a broad range of areas, including right-of-way management, zoning, and cable customer service matters. Neither the market nor the federal government is able to address these matters effectively.

9. ***All facilities-based providers should be required to make capacity available for public use.*** The Communications Act already contains a number of provisions designed to advance the public interest by requiring providers to make capacity available for public purposes. This policy should be preserved and extended by requiring all facilities-based providers to make a percentage of their network capacity available.

Any action by the federal government in response to the issues raised in this proceeding must be fair to all interested parties, respect underlying economic principles, and recognize the importance of providing access to the network in order to advance key social policies. Applying

the Coalition's nine principles would allow the Commission to develop a viable long-term policy for letting IP-enabled services grow without needless government regulation. The nine principles create a common framework for overseeing both IP-enabled services and existing services in a fashion that protects both public and private interests.

The Coalition thus urges the Commission to consider one more time whether it has the necessary authority and the public has received adequate notice of the Commission's intentions. If so, the Commission should only act in a manner consistent with the Coalition's nine principles.

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AND
MONTGOMERY COUNTY, MARYLAND

INTRODUCTION

These reply comments are filed on behalf of the Local Government Coalition.[1] The Coalition continues to believe that the Commission can only act within the confines of the Communications Act, and consequently does not have the power to take many of the steps urged by various commenters in this proceeding. The Coalition also agrees with those commenters that have expressed concerns about the breadth and vagueness of the NPRM. Nevertheless, the Coalition does believe that it is possible to identify principles to guide federal policy in this area, and the Coalition has distilled a set of nine principles to serve as a framework for the fair treatment of services, providers, and public entities.

I. THE COMMENTS OF OTHER PARTIES CONFIRM THAT THE SOURCE AND SCOPE OF THE COMMISSION'S AUTHORITY TO REGULATE IN THIS FIELD IS UNCLEAR.

The many approaches and legal theories proposed by parties in the opening round of comments illustrate the chief difficulty the Commission faces in this proceeding. Some commenters assert that IP-enabled services are subject only to Title I, and should not be regulated at all.[2] Others argue that the Commission can apply its ancillary jurisdiction under Title I to implement the policies set forth in Title II.[3] Still others argue simply that VoIP is a

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[1] In addition to the parties identified in the opening comments, the Coalition includes the Metropolitan Area Communications Commission ("MACC"), which was formed in 1980 to serve the public interest through developing, overseeing, evaluating and promoting an area-wide cable communication system in the Tualatin and Washington Counties of Oregon. Presently MACC consists of 14 jurisdictions, a list of which is available at http://www.maccor.org/. MACC also administers the City of Milwaukie, Oregon's cable franchise and serves as a forum on communications issues.

[2] *See, e.g.*, Net2Phone Comments at 3-12.

[3] *See, e.g.*, Cox Comments at pp. 23-24. The California PUC points out that if the Commission reclassifies broadband transport services as information services, it will at the same time make it impossible for the Commission to regulate VoIP and other services that include the transport component, because by reclassifying the service the Commission will have removed the Title II

telecommunications service, and Title I does not apply.[4] Some even claim that the Commission can choose the statutory basis upon which it wants to proceed.[5] EarthLink says that the NPRM is fundamentally flawed because it relies on mistaken premises about the nature of so-called "IP networks."[6] EarthLink also points out that the Commission has attempted to avoid a critical debate about the "the fundamental common carrier nature of networks used to serve the public over the public right of way."[7] While we do not agree that Title II is the only relevant guide in this area, and continue to believe that Title VI provides a parallel regulatory framework that could be applied, we do agree with the underlying point that the NPRM seems to leap to conclusions without first engaging in a considered and thorough analysis of the source and scope of the Commission's authority.

The disparity among the legal analyses put forward by the parties merely proves, as we stated in our opening comments, that the Commission will find it difficult to move ahead with any certainty in this area. It is likely that any decision the Commission makes will be challenged in the courts, and any attempt to expand the scope of the Commission's authority under Title I will receive careful scrutiny.

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predicate necessary for exercising Title I ancillary jurisdiction. California PUC Comments at 39. Cisco Systems states that "[t]he Commission's unbounded view of its authority over the Internet is both troubling and incorrect." Cisco Comments at 13. Cisco later adds that most IP services are beyond the Commission's Title I jurisdiction. *Id.* at 16.

[4] *See, e.g.*, Sprint Comments at 18.

[5] Time Warner Comments at 22-25.

[6] EarthLink Comments at 8-9.

[7] EarthLink Comments at 18.

II. FEDERAL POLICY SHOULD BE GUIDED BY A SET OF PRINCIPLES THAT WILL ESTABLISH A FAIR, RATIONAL, AND EFFICIENT REGULATORY STRUCTURE FOR THE 21ST CENTURY.

Many commenters have put forward policy proposals designed to benefit their own narrow interests, without regard to either the legitimate concerns of other parties, or whether the Commission has the necessary statutory authority. The Coalition remains convinced that the Commission is bound by the Communications Act in its present form, and thus cannot adopt many of the proposals put forward by other parties. Nevertheless, the Coalition also believes that it is possible to delineate a set of principles that, if implemented, would constitute a sound basis for a balanced federal policy. The Commission may not have the power to implement these principles under its present statutory authority, for the same reasons we have given for questioning the Commission's power to adopt other proposals. Should the Commission decide to proceed in any fashion, however, we urge it to apply these principles to the extent it has the power to do so, recognizing that additional authority may be required before the Commission can adopt a truly fair and effective set of rules.

A. The Federal Government Should Act To Promote Technological Progress while Protecting the Rights and Interests of all Affected Parties.

The Commission has long pursued the laudable goal of promoting technological progress. Federal policy should promote technology, but only in a manner that considers the rights and interests of all affected parties, including other government entities. Merely because a technology is new does not entitle it to special treatment. If it uses the same resources as other technologies, it should be regulated in the same fashion. Consequently, the Commission should not favor any particular technology or industry sector over another, nor should it favor the private sector over the interests of local governments and other public sector entities. Similarly, local government authority should not be casually preempted in the name of promoting

technology. Not only must economic principles be respected to avoid distortions in the market, but local governments must remain free to exercise their traditional roles.

B. Federal Law Should Regulate the "Facilities" Layer.

A number of parties propose that the Commission follow the "layers" model for determining what activities and entities should be regulated.[8] In particular, these parties propose that the Commission should regulate the "physical access" or "facilities" layer.[9] The Coalition agrees with this approach, because the facilities layer is not competitive.[10] Regulation of the facilities layer is necessary to ensure that facilities owners that are also providing services do not discriminate against competing service providers that do not own their own facilities. Regulation is also needed to ensure that consumers do not find that their choices and freedom of action are limited by unreasonable policies imposed by the facilities owner.

The most effective means of regulating the facilities layer is probably to enforce strict structural separation between facilities owners and service providers. This would remove incentives for facilities owners to favor their in-house service providers over third parties, and eliminate the possibility of cross-subsidies and unfair competition on the part of integrated providers. Nevertheless, structural separation may not be the only effective means of addressing

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[8] *See, e.g.*, MCI Comments at 13-20.

[9] AT&T Comments at 48-64. *See also* Arizona Corporation Commission Comments at 8 ("[R]egulation needs to recognize that ownership of facilities is important to the extent the facility owner is able to exert monopoly power."). Manufacturers also seem to support this division: "By segregating the service from the platform, IP-enabled services empower new and different service providers to enter the marketplace (horizontal expansion) and provide the ability of all service providers to offer a converged set of diverse products (vertical expansion)." Alcatel Comments at 6.

[10] MCI Comments at 13. Similarly, AT&T notes that "[a]lthough the broadband transport market may ultimately become vigorously competitive, it is not close to that level today." AT&T Comments at 49.

the problem. Regardless of the approach the Commission follows, the Commission must be very sensitive to the advantages inherent in facility ownership and the ability to cross-subsidize, as well as the potential harm to competition of allowing facilities owners to exercise those advantages.

In essence, facilities owners that do not face meaningful competition must be regulated accordingly. We use the term "meaningful competition" rather than "effective competition" because the Commission has relied on a definition of effective competition in the cable field that has been little more than an endorsement of oligopoly. In some situations the Commission has assumed competition to exist before it has actually been established through a system build-out.[11] This sort of approach does not give the public the benefits of a truly competitive market: a choice is not the same thing as competition, if there is no significant difference in the rates and quality of service available to consumers. As we discussed in our opening comments, most urban residents are served by no more than two wireline facilities-based broadband providers, and in many urban and suburban areas DSL is still not available. Furthermore, many smaller and more rural communities still have no broadband service, or are only served by one provider. Economists may differ on how many providers are needed for meaningful competition to arise or on precisely what constitutes meaningful competition, but at a minimum we do not believe it can be said to exist if the ability of individual providers to increase rates is not clearly constrained by the actions or potential actions of competitors. Two or three providers of a particular service is clearly insufficient;[12] we believe the number necessary to offer consumers both reasonable prices

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[11] *Cablevision of Boston, Inc., Petition for Determination of Effective Competitive*, Memorandum Opinion and Order, 17 FCC Rcd 4772 (2002).

[12] *See* Mark N. Cooper, *Anticompetitive Problems of Closed Communications Facilities, in* OPEN ARCHITECTURE AS COMMUNICATIONS POLICY – PRESERVING INTERNET FREEDOM IN THE BROADBAND ERA, 155, 159 (Mark N. Cooper ed. 2004).

and an assurance of reasonable service quality may be much higher. Furthermore, regardless of the number of service providers, there must still be competition among facilities owners to justify deregulation. Presumably, if truly meaningful competition develops among facilities owners, regulation of the facilities layer will be not be necessary; however, we think this is extremely unlikely for the foreseeable future, especially at the residential level.

Regulation of the facilities layer is required even though the development of multiple facilities-based providers means that communications networks are no longer natural monopolies. The absence of a natural monopoly does not mean that competition will arise automatically or that such competition that does develop will be truly meaningful. Nor can the Commission merely declare that meaningful competition exists. Providers face strong incentives to avoid paying for the right to use the property of others. And even when they are being compensated they have strong incentives to limit the ability of other parties to use their facilities. Consequently, the federal government must ensure that facilities owners are required to allow service providers nondiscriminatory access to their networks, at reasonable, nondiscriminatory rates. Facilities owners must also be required to use open network architectures so that all service providers can take advantage of access to the network with the least possible degree of dependence on the facility owner.

Furthermore, unless the Commission opts for structural separation, facilities-based providers will continue to have economic advantages over non-facilities-based providers. Thus, there will remain a need for regulation of facilities-based providers to ensure consumer protection and customer service. Some commenters argue that the states should retain the power

to deal with these issues, because the Commission is not equipped to handle them efficiently.[13] We agree with that observation, but also note that in many instances local regulators are in the best position to assist consumers with such matters. Accordingly, not only should the facilities layer be regulated, but regulatory power should be exercised at the level of government best able to resolve problems quickly and efficiently.

C. Service Providers Should Pay Fair Prices for Access to Networks.

Any person who uses the property of another should expect to pay for that right, and the government should not grant favors to particular classes of service providers. Just as the facilities layer should be regulated to prevent anticompetitive behavior by facilities owners, facilities owners are entitled to fair compensation in exchange for the use of their facilities.[14] We express no view on the methodology for calculating such fees, or on how much the fees should be. But the principle is obvious, fair, and fundamental.

D. Facilities Owners Should Pay Fair Prices for Their Use of Public Property, Regardless of Their Choice of Technology.

Just as companies that use the property of a private party should expect to pay for the privilege, companies that use public property should pay for that right. Government entities manage property for the benefit of the public, and act as trustees for the public. They thus have an obligation to obtain fair compensation on behalf of the public when private parties use public property for their own purposes. This principle is well-established, and reflected in current

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[13] Cox Communications Comments at 15. Of course, Cox and other cable operators also would have the Commission preempt what they call inconsistent and burdensome state and local regulations. *See, e.g.*, Cox Comments at 21; NCTA Comments at 40. The fact is that tens of thousands of businesses across the country comply with multiple state and local requirements every day. There is no reason for the federal government to create a special set of rules for the communications industry.

[14] OPASTCO Comments at 2-6; Ohio PUC Comments at 47; SBC Comments at 65-81.

law.[15] For example, under Section 622 of the Act, cable operators may be required to pay a franchise fee in return for the right to use the public rights-of-way, and Section 253 of the Act protects the right of state and local governments to require compensation from telecommunications providers. Similarly, the federal government, on behalf of the public, imposes fees for the right to use the public spectrum as well as other forms of public property, including public rights-of-way.[16]

Not surprisingly, various industry sectors would prefer to get something for nothing, regardless of what the law says or what simple fairness would dictate. For example, the cable industry urges action to prevent the imposition of franchise fees on their use of public rights-of-way to provide information services.[17] Similarly, telecommunications providers – both ILECs and CLECs – oppose efforts by local governments to require them to pay for the right to use the public rights-of-way.[18] But this is the wrong answer. Converting the public rights-of-way into a public good, or allowing providers to pay less than fair market value, would subsidize private industry at the expense of local taxpayers.

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[15] *City of St. Louis v Western Union Railway Co.*, 148 U.S. 92 (1893); *City of Dallas v. FCC*, 118 F.2d 393 (5th Cir. 1997).

[16] 47 U.S.C. §§ 309(j); 336(e). A recent study by the National Telecommunications and Information Administration entitled *Improving Rights-of-Way Management Across Federal Lands: A Roadmap for Greater Broadband Deployment* documents that it is the policy of the federal government to collect a fair market value ("FMV") rental fee and to recover any costs the government incurs in making federal rights-of-way available to private industry. The *Roadmap* cites a number of federal statutes requiring "rental payments" on a FMV basis. These include: 31 U.S.C. § 9701 (Fees and charges for Government services and things of value); 40 U.S.C. § 1314 (Public Property code that clarifies that rights-of-way are special property governed by their own rules. *See* 43 U.S.C. § 1761 et. seq.); 43 U.S.C. § 1764 (Land Policy and Management Requirements)and 43 U.S.C. § 1765 (Land Policy and Management Terms).

[17] *See, e.g.*, Time Warner Comments at 18.

[18] *See, e.g., TCG Detroit v City of Dearborn*, 206 F.3d 618 (6th Cir. 2000).

We recognize that the Commission has no authority under the Act to involve itself in disputes regarding the fair and reasonable compensation a state or local government charges for the use of its public rights-of-way. That being said, federal policy should specify that any entity that uses the public rights-of-way must compensate the government body that manages the property for the public. Fully implementing such a policy would presumably require legislation from Congress. The cable industry model, which caps cash compensation at five percent of gross revenues, and imposes certain restrictions on in-kind compensation, worked well for decades. There is no reason to relieve cable operators either of their traditional obligations with respect to cable service, or to deprive communities of the fair value of their property by preempting their ability to require compensation with respect to other services provided over that same system. At the same time, we would agree that it is not reasonable for ILECs to continue to receive the benefit of century-old state legislative grants that allow them use of the rights-of-way at no charge.[19] At the time those grants were made – when telephone service was considered a natural monopoly, and construction of a single network was considered an economic policy priority – the decision to allow free use of the rights-of-way may have made sense. But today, when there are multiple wireline users, and wireless providers as well, such a continuing right is a legacy of the monopoly markets of the past, and actually distorts the marketplace. It would appear that the Commission lacks the authority to abrogate those arrangements, and we would hesitate to support any action that would interfere with the rights and obligations of our parent states. Accordingly, the federal government should encourage

[19] In some states, the RBOCs and sometimes other LECs claim to have been granted the right to use public rights-of-way without compensation to provide telephone service. These grants often date back to the late 19th or early 20th century; their origins and scope are often murky or contested, and may take the form of a statute or some form of express grant. In other states, local governments retain the power to grant all providers the right to use local rights-of-way.

states to read the grant of such rights narrowly and at the very least to require compensation for any use not clearly contemplated at the time the grant for the use of the property was made. The policy of the federal government should also be to support the right of state and local governments to replace such grants with up-to-date right-of-way legislation that both regulates users appropriately and fairly compensates the public for the use of public property.

In this regard, we note EarthLink's comments to the effect that there are no new networks being deployed, just old networks being used in a new way.[20] It is wrong to think of the Internet as a new network, or of IP-based companies as building new networks. All the new facilities are ultimately interconnected, and all the new providers and services depend on legacy facilities to some degree. The technology being used to transmit communications is changing, and new services may be possible, but the fact remains that private companies are still using public property to transmit communications. The nature of the technology does not alter the fact that signals are transmitted over wires, and the wires occupy the public rights-of-way. Similarly, wireless signals still use the public airwaves, regardless of whether they are IP-based or not. Thus, there is no reason to exempt any class of companies from paying compensation for the use of public property merely because they are using a new technology or providing a new service.

Facilities-based providers are currently required to provide compensation for the use of public property, subject only to exceptions under state law, and the recognition of this requirement should continue to be reinforced by any decision of the Commission. The right to determine the appropriate level of compensation required is specifically reserved to the owner of the property (federal, state, or local) and therefore continues to be outside of the sphere of the

[20] EarthLink Comments at 8-9.

Commission's jurisdiction or control. The requirement for compensation itself, however, is and should continue to be unequivocal.

Finally, if the Coalition's principles were to be adopted, non-facilities-based service providers would presumably pay facilities owners fair compensation for access to the facilities they use; that compensation should be included in the revenue computation when determining the compensation to be paid to the owner of the underlying right-of-way. This allows for a simpler and more efficient system than one in which all service providers are required to pay for the right to use the rights-of-way. Safeguards would be needed, however, to ensure that providers do not structure their affairs so as to avoid or minimize the obligation to pay compensation. The total level of compensation to the entity responsible for managing the public right-of-way must be fair and reasonable.

E. Federal Law Should Forbear from Economic Regulation of Service Providers in Competitive Markets.

Where meaningful competition exists for a given service, federal law need not engage in economic regulation of any provider of that service. There seems to be a broad consensus that economic regulation of service providers is not necessary, but commenters made no distinction between facilities-based and non-facilities-based providers.[21] The key requirement is that there must be truly meaningful competition, with respect to price, quality, and terms of service. Assuming structural separation and/or nondiscriminatory access to facilities, we believe that with respect to services being provided over the network, sufficient competition will develop to justify

[21] Few commenters seem to have addressed the point directly. The Department of Justice expressly took no position on this point, but noted that fencing IP-enabled services off from economic regulation does not mean that they must be fenced off from other public policy concerns, such as CALEA and public safety requirements. DOJ Comments at 4. Most commenters seem to assume that the terms of provision of services – that is, the relationship between service providers and their customers – need not be regulated.

deregulation for most, and possibly all, services. However, if facility owners or facilities-based providers are allowed to restrict access to their networks, or if an oligopoly develops for a particular service, economic regulation will be necessary. Thus, while there should be a presumption of deregulation for service providers at the federal level, it should take the form of forbearance, rather than a denial of authority to regulate. Furthermore, state and local governments retain their police powers, and the federal government should respect the traditional prerogatives of these governmental entities.

F. All Service Providers Should Be Required To Contribute Towards Support of Universal Service.

In general, commenters agree with the Coalition's basic position regarding universal service: Universal service is a central element of our communications policy and must be protected.[22] The present approach to funding universal service is too narrowly-based and is not sustainable now, even with the limited deployment of IP-enabled services to date. To address this problem, all service providers should be required to contribute to universal service in some fashion.[23] Any regulatory scheme that requires one class of service provider to pay while allowing another not to pay is unsustainable in the long run. Consequently, all providers of services that use the network should contribute to universal service funding on some basis. While non-facilities-based providers might argue that such a funding mechanism would unfairly

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[22] *See, e.g.*, BellSouth Comments at 48-49; Charter Comments at 9; MCI Comments at 48-49; OPASTCO Comments at 9; SBC Comments at 112; Time Warner Comments at 15; Verizon Comments at 55.

[23] This raises the question of the Commission's authority to impose obligations on information service providers who are not otherwise subject to the Act. As we discussed in our opening comments, we have doubts regarding the Commission's power to regulate such entities. Nevertheless, it is important that all service providers bear the same obligation, since all benefit from the expansion of the network. Imposing the contribution obligation only on facilities-based

benefit facilities-based service providers, proper regulation of the facilities layer can deal with that issue: payments to facilities owners out of the universal service fund can be monitored to ensure that funding is used only to expand connectivity and not to cross-subsidize the provision of competitive services or to inflate profits.

G. All Providers of Voice Services Should Be Required To Offer E-911 Functionality and Disability Access.

There is also a broad consensus in support of requiring all providers of voice services to offer E-911 service and disability access.[24] Some parties differ on the need for prompt action, as well as the scope of the Commission's authority, but the importance of making these functionalities available is clear.

With respect to E-911 service specifically, APCO's comments effectively underscore the dangers which VoIP services present for the nation's 911 emergency response system, unless providers are required to offer E-911 capability, *i.e.*, the selective routing of 911 calls to the correct PSAP with a call-back number, and accurate location and number information, delivered directly to 911 terminals – in other words, the same 911 functionality now required of the switched network.[25] These requirements are so fundamental, much like universal service, that there really can be no debate about the underlying policy. No 911 center should be required to accept emergency calls from VoIP systems unless they are delivered with full E-911 capability. As APCO rightly points out, there is very real concern among PSAPs that 911 operations and their ability to respond effectively to other 911 calls would be seriously compromised if they

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providers is not sustainable in the long run, because it will create an incentive for providers to migrate services from regulated to unregulated entities, thus weakening the fund over time.

[24] *See, e.g.*, SBC Comments at 95-112; TimeWarner Comments at 12-15.

[25] APCO Comments at 4-7.

take emergency calls through ten digit administrative lines, or otherwise without full E-911 capability (APCO notes, and Coalition members can verify, that many VoIP operators have already given notice they will route "911" calls to administrative lines, whether the PSAPs agree or not).

Furthermore, local governments report that the introduction of VoIP raises other issues that must be addressed. Regulation is required to speed deployment, because voluntary standards merely lead to delay as the parties debate such issues as how to define the service to be provided.[26] In addition, local governments have concluded that they need to expand their own capabilities to meet demands imposed by VoIP users, but there is no funding mechanism in place to support the increase in costs.[27]

The Commission will need to consider how best to meet the need for extending E-911 service in light of the scope of its jurisdiction and authority. APCO has called for an expedited proceeding to address the public safety issue.[28] We agree that this is a critical issue that needs to be resolved quickly, provided that the Commission can do so in a manner that treats all parties fairly – including providers using all types of technology – and is consistent with the statutory limits on the scope of the Commission's authority.

With respect to access for the disabled, as noted above, industry representatives generally acknowledge that the issue must be addressed.[29] A range of other commenters also suggest

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[26] King County Comments at 7.

[27] *Id.* at 3.

[28] APCO Comments at 2.

[29] *See, e.g.*, Avaya Comments at 13-17; SBC Comments at 104-112; TimeWarner Comments at 14.

extending disability access requirements to IP-enabled services.[30] Communication Services for the Deaf, Inc. ("CSDI"), states that marketplace competition will not safeguard the interests of people with disabilities; in the past, access has been provided only as a result of regulatory intervention, and there is no reason to believe this has changed.[31] Avaya agrees that market forces will not be sufficient, because of the small size of the market, and because the disabled tend to have reduced incomes.[32] CSDI also notes that the commitment to universal service demands the provision of access to the disabled.[33]

As with all the issues raised by this proceeding, the Commission will need to determine the scope of its statutory authority regarding disability access, and proceed accordingly.

H. The Federal Government Should Respect and Preserve the Police Powers of State and Local Governments.

As we discussed in our opening comments, state and local governments have primary responsibility for a number of areas either not mentioned or barely touched on in the NPRM. These include consumer protection (including cable customer service), zoning and land use, and right-of-way management. Various parties addressed these issues, stressing the importance of the role of state and local governments. For example:

- A number of states have implemented "minimum standard" regulations for telephone service quality, which establish criteria by which to measure customers' service-related experiences with telecommunications providers, field staff who make repairs and service calls, and business offices, as well as network performance. This type of regulation is commonplace for a variety of industries affecting public safety and economic prosperity. Residential consumers have come to rely on these state regulations to ensure that they

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[30] *See, e.g.*, Arizona Corporation Commission Comments at 15; American Foundation for the Blind Comments; CSDI Comments.

[31] CSDI Comments at 10-13.

[32] Avaya Comments at 16.

[33] *Id.* at 13-14.

receive reliable and high quality telephone service and that they have appropriate consumer protections. AARP Comments at 2.

- Especially as IP-enabled telecommunications services move beyond a handful of tech-enthusiasts to Main Street America, the Commission must not take a "buyer beware" approach to telephone service. To the extent that VOIP providers hold themselves out as a substitute for telecommunications services, VOIP providers should be subject to the full panoply of state and federal consumer protection regulations. CenturyTel Comments at 22.
- There is a myth that subscribers do not need to be protected from fraudulent or abusive industry practices where the market is competitive. Reality disproves that myth. The most competitive industries often engage in abusive practices. Nor can the Commission rely on the fact that VoIP is an emerging market. The pressures to establish a market presence and succeed in a competitive market are enormous, and create incentives to engage in unfair or deceptive practices. The potential for abuse is particularly great in the telephone market, where a subscriber cannot easily and costlessly change service providers from one day (or month) to the next. City of San Francisco Comments at 13.
- States and territories are more accessible to businesses, consumers and communications companies in local markets than federal officials, and states have developed expertise as regulators of telecommunications. States and local governments have done an excellent job working with communications companies as intermediaries on behalf of citizens to ensure their telephone service is functional and to protect them from fraud and abuse. As traditional telephone services begin to migrate to the Internet, statutory and regulatory provisions should maintain the states' central role in protecting consumers. National Governors Association Comments at 5.

The cable industry calls for preemption of state and local authority on the grounds that "piecemeal regulation" would be "unmanageable."[34] This is simply incorrect and there is no reason the cable industry or any other sector should receive special treatment. All kinds of businesses deal with different state and local requirements every day. While perhaps inconvenient to the businesses, these requirements are essential to protect the interests of the public, in the eyes of officials duly elected at the state and local level.

State and local governments retain their police powers, and continue to exercise those powers to address matters that are beyond the authority of the federal government or its capacity to handle effectively. There is no substitute for the role played by local governments in such

[34] *See, e.g.*, NCTA Comments at 40.

matters as street construction, maintenance, and repair, and day-to-day traffic management. In addition, federal law specifically recognizes local authority over right-of-way management, zoning, and cable customer service matters. Those powers are creatures of state, not federal law, and the Commission has no power to preempt them without explicit authorization from Congress.

I. All Facilities-Based Providers Should Be Required To Make Capacity Available for Public Use.

The Act contains a number of provisions designed to advance the public interest by requiring providers to make capacity available for public purposes. For example, cable and OVS operators can be required to make channel capacity available to meet community needs and interests for public, educational and governmental access programming. The Commission, as directed by Congress in Section 25 of the Cable Television Consumer Protection Act of 1992, has also taken steps to create similar requirements for Direct Broadcast Satellite providers.[35] And local broadcasters are expected to meet needs for local community programming. These policies all advance the interests of allowing the public access to information about government and community affairs, as well as the opportunity for the government, the community, and the public to disseminate information.

Any comprehensive regulatory scheme must extend the same principles to facilities-based providers that use new technologies and advanced network capabilities. Adequate public interest requirements to provide capacity for the purpose of communication by public agencies with the public, as well as to allow members of the public themselves access to the means of

[35] *See* 47 C.F.R. § 25.701.

information transmission, obviate the need to impose fairness obligations directly on commercial speakers.

Accordingly, the Commission should require all facilities-based providers to make a percentage of the capacity on the network available for these important public interest purposes and goals.[36]

III. THE NPRM DOES NOT PROVIDE ADEQUATE NOTICE TO THE PUBLIC.

We noted in our opening comments that it is difficult to respond to the NPRM in a sensible fashion, because there is so much uncertainty about key legal issues that one can only speculate about what the Commission might actually be able to do. Several other parties have noted that the NPRM does not provide adequate notice to the public regarding any rule the Commission might adopt, simply because the subject matter of the NPRM is so broad and the NPRM offers few specific proposals. The Small Business Administration points out that the NPRM "does not contain concrete proposals," and that the initial regulatory flexibility analysis "does not provide an analysis of proposed compliance burdens, consideration of alternatives, or discussion of overlapping regulations."[37] EarthLink observes that the NPRM does not comply with the Administrative Procedure Act because it fails to actually propose a rule and is so broad and vague that the public is not given fair notice of what rules the Commission might actually adopt.[38] We share these concerns. Consequently, despite our effort to develop a coherent and comprehensive regulatory approach, we doubt very much that the Commission can do anything useful in the form of adopting rules at this stage in response to our comments or those of any

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[36] We believe that the model now being considered by the Vermont Public Service Board is a good one to follow in this regard. *See* http://www.state.vt.us/psb/rules/redline_as_revised.pdf.

[37] SBA Comments at 1.

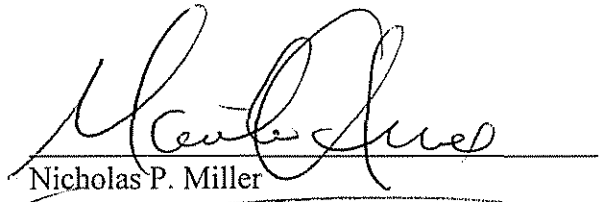
[38] EarthLink Comments at 19-23.

other party. The Commission should develop a more refined set of proposals and seek further comments before it takes any action.

CONCLUSION

The Coalition believes that any action by the federal government with respect to IP-enabled services must be governed by fairness to all participants, respect for underlying economic principles, including the rejection of implicit subsidies, and recognition of the need for ensuring access to the network to advance key social policies. Nevertheless, serious doubts remain about the ability of the Commission to regulate IP-enabled services effectively, as well as about the adequacy of the notice provided by the NPRM. We urge the Commission to seek authorization from Congress if it sees the need to act outside the scope of Title II and Title VI of the Communications Act.

Respectfully submitted,



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